The Asymmetric Bet of Europe

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The "White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025" recently presented by the Commission has already triggered discussion and received attention (and criticism).

It is evident from the subtitle of this document that the Commission does not consider the UK as one of the future members of the EU, which is curious since Art. 50 TEU has not been activated yet. This is in line with a general (and questionable) attitude shown by the supranational institutions on Brexit.

However, here I would like to share some thoughts on one of the options recalled by the White Paper and then endorsed by France, Germany, Italy and Spain in a recent meeting, namely that of an asymmetric Europe. Being myself a comparative lawyer I have nothing against asymmetry, which should be conceived as an instrument of differentiated integration. At the same time, in order not to alter the integrative potential of this instrument it is necessary to provide the system with constitutional safeguards. These caveats are crucial since they make the asymmetry produced by enhanced cooperation sustainable under EU law, by impeding the violation of the untouchable core of the EU. Sustainability here should be understood as "proven ability to hold together, to sustain, mutually inconsistent sub-traditions" or, in other words, to "achieve complexity".

The literature on differentiated integration and multi-speed Europe is huge, and this explains why the ideas of differentiated integration and asymmetry have been extended and adapted to many different processes by scholars over the years. In this sense, symmetry and asymmetry have been defined in the following terms: "Federal symmetry refers to the uniformity among member states in the pattern of their relationships within a federal system. 'Asymmetry' in a federal system, therefore, occurs where there is a differentiation in the degrees of autonomy and power among the constituent units."

While some comparative lawyers still treat asymmetry as an exception in the life of federal polities (and this can be explained by conceiving the *foedus* as a contract between parties put on an equal footing), actually this concept has progressively acquired a key role in the history of federalism. In other words, today asymmetry is the rule rather than the exception in this field.

Asymmetry has been frequently experimented with within federalising processes, especially in those federal or quasi-federal contexts characterised by the coexistence of different legal and cultural backgrounds (Canada, for instance but also Belgium, India and Spain). One should take this into account before conceiving, for instance, of enhanced cooperation as a form of "constitutional evil" conducive to a "disintegrative" multi-speed Europe.

On the contrary, asymmetry might even serve as an instrument of constitutional integration. For instance, flexibility and asymmetry are two of the most important features of Canadian federalism, elements partly explicable by taking into account the cultural and economic diversity present in the territory. In an important contribution Bauböck recalls that: 1) asymmetry can affect cohesion, that is, "the glue binding the component parts together"; 2) asymmetric powers can translate "unequal representation of citizens in federal government and thus can be seen to violate a commitment to equal federal citizenship"; and 3) asymmetry may be perceived as a threat to the quality of the democratic debate, making the polity less understandable to citizens and creating "incentives for bargaining that will generate even more asymmetry."

At the same time asymmetry is a resource for a polity that wants to recover disadvantaged minorities and that respects the equal dignity of its components. In other words, asymmetry is a game between centripetal and centrifugal forces, and here again one can find interesting clues from comparative studies. Indeed, the debate on the possible negative implications of asymmetry leads to the identification of a constitutional core of principles and values whose respect makes asymmetry "sustainable": this is also the rationale of asymmetry in EU law for instance, when dealing with Art. 326 TFEU.

As comparative law shows, asymmetry works as a safety valve of some tensions generated by the coexistence of different cultures.

This is crucial to conceive the flexibility ensured by asymmetry as an added value to the integration phenomenon. Against this background, flexibility gives “something more” to the life of a political system only when the identity of this system is preserved; otherwise, flexibility would lead to a revolution in a technical sense, i.e. a transformation of the identity of the legal system. In order to avoid this, a legal system allowing asymmetry presents some constitutional safeguards.

Scholars have conducted in-depth studies of the contours acquired by the idea of differentiation in EU law and its main sources, distinguishing several models. Others have harshly criticised the asymmetric option, looking at it as incompatible with an integration process. Finally, another group of authors has insisted on the positive implications of a multi-speed Europe to overcome the difficulties present in the enlarged Union.

The EU already knows some forms of asymmetry; the opting-out mechanism, the open method of coordination, and enhanced cooperation are just some examples. The new economic governance, in particular the adoption of the new Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), gave new lifeblood to the debate on asymmetry in the life of the Union.

The instrument of enhanced cooperation is particularly useful in understanding the important role played by those constitutional safeguards aimed at making asymmetry sustainable and thus functional to the goals of integration.

Enhanced cooperation aims to ensure, at the same time, unity and diversity. In fact, it allows Member States to experiment with different forms of integration without “shutting the door” to those unwilling to take steps towards deeper integration in specific areas (openness is at the heart of Art. 331 TFEU). Enhanced cooperation can be conceived as a sort of *extrema ratio* to be exploited when the Council realises that the goals of integration cannot be achieved within a reasonable period by the EU as a whole. The procedures to be followed in this case ensure the intervention and control of the other EU institutions (Commission, Parliament) guaranteeing the common agents’ control.

Enhanced cooperation under EU law also counter-balances (partly at least) Bauböck’s argument on the lack of transparency of asymmetrical dynamics, since according to Art. 330 TFEU, “[a]ll members of the Council may participate in its deliberations.” Finally, enhanced cooperation is conceived for specific areas, and this is “a guarantee not only for those Member States without the political will to join enhanced cooperation from the beginning, but also for those which do not meet the objective requirements for joining the enhanced cooperation scheme.” As mentioned previously, the discipline of enhanced cooperation under the EU is emblematic of how asymmetry can perform an integrative function. The governing provisions are Arts. 330-333 TFEU and Art. 20 TEU. As scholars pointed out, all these rules can be traced back to three groups of norms: those concerning the activation (minimum number of Member States, role of the Commission, Parliament and Council), those regarding the functioning of enhanced cooperation (regular use of the EU institutions, application of particular rules for the working of the Council, use of the *passerelle* clause) and, finally, those governing the possibility to join the cooperation for the “non-original parties.” More generally, when analysing these provisions it is possible to infer limits and conditions – what Fabbrini calls both *ex ante* and *ex post* caveats – of enhanced cooperation in EU law (for instance, exclusion of areas covered by the EU’s exclusive competence, the necessity to rely on it as a last resort, compliance with the EU Treaties).

All these elements serve as constitutional safeguards since they make the asymmetry produced by enhanced cooperation sustainable under EU law.

At the same time, sustainability is also guaranteed by norms like Art. 326 TFEU which clarifies that enhanced cooperation “shall comply with the Treaties and Union law” and “shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them”. By so doing this provision identifies a list of elements that can be traced back to that untouchable core we referred to.

What can we learn from these technical points? In theory this reference to multi speed is not necessarily a bad thing but, unfortunately, the White Paper does not say too much on how such an asymmetric option should be activated and carried out. The EU Treaties already give a spectrum of possibilities, however, whatever this reference means it will be necessary to handle asymmetry with care, either by following the existing rules or by devising ad hoc safeguards to avoid transforming the EU into something else, into a different beast whose contour is barely recognisable to those who care about Europe.

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